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Supreme Court, U.S.
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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

SCOTT POHLMAN,

Cross-Petitioner,

vs.

ANTOINETTE RUSSO AND MILDRED MALONEY,

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. WHETHER STATE OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY IN AN ACTION BROUGHT UNDER 42 U.S.C. §1983 IF A PUBLIC OFFICIAL'S CONDUCT WAS NOT IN VIOLATION OF CLEARLY ESTABLISHED LAW AS IT EXISTED AT THE TIME IN QUESTION.

PARTIES TO THE PROCEEDING

Cross-Petitioner

1. Scott Pohlman, in his individual capacity as a state liquor control agent.

Cross-Respondents

1. Antoinette Russo, the owner of the Stagecoach Restaurant and Lounge located in Beaver Township, Ohio.

2. Mildred Maloney, a former employee at the Stagecoach Restaurant and Lounge.

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The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is reproduced beginning at page A-1 in the appendix to the petition for writ of certiorari in Antoinette Russo, et al. v. Carl Massullo, et al., Case No. 90-1928. The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is unreported and is reproduced at page B-1 in the appendix to the petition for writ of certiorari in Antoinette Russo, et al. v. Carl Massullo, et al., Case No. 90-1928.

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for Sixth Circuit was rendered on March 5, 1991. This cross-petition is authorized by Rule 12.3 of the Rules of the Supreme Court of United States in response to the petition for writ of certiorari in

Case No. 90-1928, which was received by Cross-Petitioner on June 18, 1991. The Court's jurisdiction to review the Lower Court's judgment is conferred by 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent portion of 42 U.S.C. §1983 is reproduced at page 3 of the petition for writ of certiorari in Antoinette Russo, et al. v. Carl Massullo, et al., Case No. 90-1928.

STATEMENT OF THE CASE

The Statement of the Case contained in Respondent's Brief in Opposition to the Petition for Writ of Certiorari in Case No. 90-1928, is incorporated herein by reference.

ARGUMENT

I. **IN THE INTEREST OF A FULL AND FAIR ADJUDICATION, THE ISSUES PRESENTED BY THIS CROSS-PETITION SHOULD BE ADDRESSED IN THE EVENT THE PETITION FOR WRIT OF CERTIORARI IS GRANTED IN ANTOINETTE RUSSO, ET AL. v. CARL MASSULLO, ET AL., Case No. 90-1928.**

This cross-petition for a writ of certiorari is brought pursuant to Rule 12.3 of the Rules of the Supreme Court of the United States. Cross-Petitioners are Respondents in Antoinette Russo, et al. v. Carl Massullo, et al., Case No. 90-1928 (docketed June 13, 1991), and have filed a brief in opposition to that petition. Cross-Petitioner does not believe that the issues raised by Petitioners Cross-Respondents warrant the plenary review of this Court.

In the event the Court issues a writ of certiorari in Case No. 90-1928, however, a full and fair adjudication can only be

conducted if all issues decided by the court below concerning the constitutionality of the actions taken by the Respondents on April 16, 1987 during the raid on the Stagecoach are before this Court. In the interests of justice, therefore, the Court is urged to grant this cross-petition for a writ of certiorari if it grants a writ of certiorari in Case No. 90-1928.

The Sixth Circuit diverged from a decision of this Court, the Ninth Circuit, and its own published opinions in its decision to deny qualified immunity to Respondent Pohlman. This case therefore satisfies the criteria for issuance of a writ of certiorari under Rule 10 of the Rules of the Supreme Court of the United States which provides, in pertinent part:

* * *

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal

question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

II. THE UNPUBLISHED DECISION ISSUED BELOW IS IN CONFLICT WITH A DECISION OF THE FOURTH CIRCUIT AS WELL AS WITH PUBLISHED SIXTH CIRCUIT DECISIONS ON THE QUESTION OF WHAT CONSTITUTES CLEARLY ESTABLISHED LAW TO DETERMINE QUALIFIED IMMUNITY.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court established that state officials are entitled to qualified immunity, so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. See also, Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

The Fourth Circuit holds that clearly established law flows only from decisions of this Court, the appropriate United States Court of Appeals or the highest state court. See Wallace v. King, 626 F.2d 1157 (4th Cir. 1980), cert. denied, 451 U.S. 969 (1981).

In Wallace, law enforcement officers claimed qualified immunity protected them from a §1983 action challenging execution of an arrest warrant in the home of a third party. The Fourth Circuit found the challenged arrest did not violate "clearly established law":

> ... [L]aw enforcement officers should not be held personally liable for monetary damages because they have followed the policy or instructions of their superiors, where the controlling law had not been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state. . . .

626 F.2d at 1161.

The Sixth Circuit, following Wallace, previously held:

> In order to be clearly established, a question must be decided either by the highest state court in the state where the case arose, by a United States Court of Appeals, or by the Supreme Court. Wallace v. King, 626 F.2d 1157, 1161 (6th Cir. 1980), cert. denied, 451 U.S. 969 (1981). ... Although we have not previously addressed the issue, we believe Wallace sets the proper standard in considering a claim of official immunity.

Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988). In Ohio Civil Service Employees Ass'n v. Seiter, 858 F.2d 1171 (6th Cir. 1988) the Sixth Circuit considered this Court's decisions and their own pecedent and determined that:

> ... in the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself.

858 F.2d at 1177. The Sixth Circuit went on to examine the extraordinary case where it may be possible for other decisions to "clearly establish a principle of law" and stated:

> For the decisions of other courts to provide such "clearly established law,"

> these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds would be found wanting.

Id.

At no time prior to this case has the Sixth Circuit examined intermediate state decisions to determine "clearly established law." However, the Sixth Circuit now mistakenly relies on Mills-Jennings v. Department of Liquor Control, 16 Ohio App. 3d 290 (1984), an intermediate state court, as a source of clearly established law. Petitioners' Appendix to Petition for Writ of Certiorari, Case No. 90-1928 ("App.") (App. p. A-13). The Sixth Circuit also points to dictum of the Ohio Supreme Court in Mills-Jennings v. Department of Liquor Control, 70 Ohio St. 2d 95 (1982), as creating clearly established law. (App. p. A-13). Finally, the Lower Court looked to

statements made by counsel for Ohio Department of Liquor Control during oral argument before the Ohio Supreme Court as a source of clearly established law. Id. None of these three items are recognized by the Fourth Circuit as a legitimate source of clearly established law for purposes of determining qualified immunity. Wallace, 626 F.2d at 1161. Moreover, reliance on these sources is a clear departure from prior published Sixth Circuit precedent. Ohio Civil Service Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988); Poe v. Haydon, 853 F.2d 418, 424 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989); Robinson v. Bibb, 840 F.2d at 351; Garvie v. Jackson, 845 F.2d 647, 649 (6th Cir. 1988); Davis v. Holly, 835 F.2d 1175, 1180 (6th Cir. 1987).

On the other hand, the Ninth Circuit has determined that "in the absence of binding precedent, a court should look to whatever

decisional law is available to ascertain whether the law is clearly established under the Harlow test." Capoeman v. Reed, 754 F.2d 1512, 1514 (8th Cir. 1985). While Capoeman does not specify an exact definition of "whatever decisional law is available" it does recognize that its position is contrary to the Fourth Circuit in Wallace. Id.

This conflict between the circuits warrants this Court's exercise of its jurisdiction in order to give guidance on the question of what constitutes clearly established law when determining a public official's entitlement to qualified immunity.

III. THE DECISION OF THE LOWER COURT CONFLICTS WITH A DECISION OF THIS COURT ON THE ISSUE OF WHETHER SUBJECTIVE BELIEFS ARE RELEVANT TO DETERMINE A PUBLIC OFFICIAL'S ENTITLEMENT TO QUALIFIED IMMUNITY.

In Anderson v. Creighton, 483 U.S. 635 (1987) the Court reaffirmed its decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982) holding that whether an official is entitled to qualified immunity for an allegedly unlawful act turns on the "objective legal reasonableness" of his action. Anderson, 483 U.S. at 639 citing Harlow 457 U.S. at 819. The Anderson Court pointed out that while the question of whether a reasonable officer could have believed a warrantless search to be lawful "will often require examination of the information possessed by the searching officials. ... this does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that Harlow sought to minimize." 483 U.S. at 641.

The Sixth Circuit's decision reintroduces a subjective inquiry by relying on Pohlman's testimony that "he understood the law to require more than mere presence of the

machines inside a liquor establishment, i.e. a payoff" to find that the search was not objectively reasonable in light of the clearly established law. (App. p. A-14). Pohlman's mistaken understanding, as a lay person, of the legality of the mere presence of a draw poker machine in a liquor establishment is irrelevant under the objective legal reasonableness test. At the time of the incident in question draw poker machines were gambling devices per se under Mills-Jennings v. Department of Liquor Control, 70 Ohio St. 2d 95 (1982). Possession of gambling devises by liquor permit holders was prohibited under Ohio Admin. Code 4301:1-1-53(B). By giving relevance to Pohlman's personal misconception concerning the state of the law, the Lower Court has replaced the objective legal reasonableness standard with an inquiry into Pohlman's subjective beliefs about the search. As this Court stated in

Anderson, the official's "subjective beliefs about the search are irrelevant." Anderson, 483 U.S. at 641.

This departure from Harlow and Anderson puts the Sixth Circuit in conflict with this Court, thus warranting the issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons, this cross-petition for a writ of certiorari should be granted if this Court grants the petition for writ of certiorari in Case No. 90-1928.

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